SINGAPORE REPORTS

Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof

HIGH COURT (SINGAPORE) – SUIT NO 2677 OF 1986
(SUMMONS-IN-CHAMBERS NO 5825 OF 1986)
THEAN J
22 FEBRUARY 1989

Banking – Loan – Shares deposited as security – Fall in value of security deposited – Failure of borrower to deposit additional security – Duty of mortgagee in selling mortgaged property – Whether mortgagee has duty to sell at a particular time.

The plaintiffs, a finance company carrying on business in Singapore, entered into a loan agreement with the defendant. Under the agreement, the defendant agreed to deposit and charge to the plaintiffs certain shares as security. Later, the defendant began to default on interest payments due under the loan agreement. A fall in the market value of the shares deposited meant that the security for the loan was inadequate under the agreement. The defendant did provide some additional security but not to the extent required by the plaintiffs. The plaintiffs' solicitors then demanded payment from the defendant of the difference between the amount owing and the value of the security deposited. When the defendant failed to comply, the present action was started against him. An O 14 judgment was obtained against the defendant for the amount owing. However, the seccurity held by the plaintiffs had been sold without the proceeds being offset against the amount owed. As a result, the judgment against the defendant was not in order. After the net amount owed was agreed between the parties the appeal from the O 14 judgment was heard. The defendant raised several defences, namely, that the plaintiffs were estopped by the conduct of their servants or agents from pursuing their claim against the defendant, that the action was premature in that the plaintiffs could only sue for the balance owing after the security had been sold, and that the plaintiffs had breached their duty as mortgagee by failing to sell the shares at market value.

Held, dismissing the defendant's appeal:

(1) Several letters were written by the plaintiffs to the defendant asking the latter to pay the interest owing or to reduce the loan by paying various amounts, thus showing that there was in fact no estoppel created against the plaintiffs.

(2) The defendant's failure to pay the amount demanded entitled the plaintiffs to commence proceedings, and the plaintiffs were at liberty to sell the security after the start of the action.

(3) The plaintiffs, as mortgagee, after the power of sale had arisen, were entitled to sell the security at such time as they thought fit as long as they sold in good faith and obtained the true market value of the security at the date of sale; here, the plaintiffs sold the security which were listed shares at the quoted prices then prevailing and were under no obligation to sell only at a particular time.

(4) The defendant's defence that the loan was taken out as an agent for Y was unsupportable, and all the evidence, such as the defendant's loan application and his written instructions to the plaintiffs, all showed that he was acting on his own behalf.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 94 of 1988.]

Case referred to

1 *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd* [1971] Ch 949 (folld)

Molly Lim (Ms) for the plaintiffs.
G Gopalan for the defendant.

Cur Adv Vult

Thean J: The plaintiffs are a finance company carrying on business in Singapore. On 24 October 1984, they entered into an agreement with the defendant ('the agreement') whereby the latter agreed, in consideration of a sum of $4,200,000 lent to him, to deposit with and charge to the plaintiffs certain shares as described in the schedule to the agreement as security for the loan. Soon after the agreement, on instructions from the defendant, the plaintiffs released the loan of $4,200,000 to his stockbroker, Lyall & Evatt (Pte), in payment of certain shares purchased by the defendant and these shares were also deposited with and charged to the plaintiffs as security for the loan. Under the agreement, the defendant was obliged to pay interest on the loan on the first day of each month and in default further interest at the rate therein provided would be payable.

In the later part of 1984 the defendant began to fall into arrears in payment of interest, and as of 29 January 1985 he was in arrears for three months and the amount of interest due was $91,592.08. The defendant for the whole year 1985 did not succeed in paying up the interest due from time to time and continued to be in arrears. During the period between March and September 1985, some payments were made to account of interest and these payments were derived mainly from the proceeds of sale of some of the shares charged to the plaintiffs. The unsatisfactory state of his loan account with the plaintiffs was compounded by a fall in the market prices of the shares charged to the plaintiffs, in consequence of which the security provided by these shares became inadequate. The defendant was therefore requested to repay a part of the loan or alternatively to provide additional security; in response, the defendant did provide the plaintiffs with some further shares as security but not to the extent as required by the plaintiffs. So in effect the various demands or requests for payment of interests, payment of principal or the provision of additional security were not fully complied with by the defendant.

On 27 February 1986, the plaintiffs' solicitors wrote to the defendant informing him of the balance owing to the plaintiffs and the estimated value of the shares then charged to the plaintiffs, and requesting the defendant to repay to the plaintiffs the difference between the amount owing and the value of the shares, namely, a sum of $2,146,076.75. This demand was again not complied with and, accordingly, on 8 April 1986, the plaintiffs instituted this action against the defendant claiming the sum of $2,146,076.75. As reflected in the statement of

claim indorsed on the writ, this sum was arrived at as follows. The amount owing was $3,691,901.75 and the value of the shares then charged to the plaintiffs was estimated to be $1,545,825, and after giving credit for the estimated value the balance owing was $2,146,076.75.

After the commencement of this action, the plaintiffs took out an application under O 14 for summary judgment for the amount claimed. The application was resisted by the defendant and was heard by the senior assistant registrar who gave judgment against the defendant for the sum of S2,146,076.75 with interest and costs. Against that decision, the defendant appealed. At the first hearing of the appeal, I was informed that the plaintiffs had since the commencement of the action sold all the shares held by them as security and credit had yet to be given for the net proceeds received by the plaintiffs. Clearly on that ground, the judgment then entered was not in order, and I adjourned the hearing to another date to enable a further affidavit to be filed by the plaintiffs giving particulars of the sales, the net proceeds received and the balance of the amount owing. The affidavit was subsequently filed on behalf of the plaintiffs giving the particulars, and an affidavit in reply was also filed by the defendant. The appeal was restored for further hearing and at the conclusion of the hearing I set aside the judgment of the senior assistant registrar and entered judgment for the plaintiffs in the sum of $1,301,627.86 being the balance of the amount owing together with interest and costs and allowed to the plaintiffs one-half of the costs of the appeal.

There was really no dispute on the amount owing. The loan was admitted and the balance owing had been computed and set out in the affidavit of Nellie Koh Siok Ngoh affirmed on 22 March 1988. The defendant further admitted owing the plaintiffs the sum of $3,619.901.75 as at 18 February 1986 and did not challenge the computation of the balance owing as at the date of the hearing. However, three defences were raised on behalf of the defendant and they were as follows:

(i) that the plaintiffs were estopped by the conduct of their servants or agents from pursuing this claim against the defendant;
(ii) that the action was premature in that the plaintiffs should only sue for the balance amount owing after all the shares had been sold, and
(iii) that there was a breach of duty on the part of the plaintiffs in that as a mortgagee they failed to sell the shares at their market values.

On the first defence, it was alleged by the defendant in his affidavit affirmed on 15 October 1986 that from June 1985 the shares which were charged to the plaintiffs began to fall in value substantially and that a discussion took place with one Mr Lim, an officer of the plaintiffs, on the question of providing additional security and the 'wisdom of selling of the said shares in the depressed market', and it was agreed that it would not be in their interest to sell or continue to sell the shares in the depressed market apart from selling small lots thereof to pay the interest on the loan. In consequence, the shares were not sold and the plaintiffs 'continued to make available the loan and waived their rights under cll 5 and 7 of the agreement'. Apart from the bald statement made by the defendant, there was no evidence at all in support. On the contrary, for the period from June to December 1985, there were several letters written to the defendant from time to time requesting him to pay the interest owing or to reduce the loan by paying various amounts. Nothing was produced to show in any way that the plaintiffs had waived their rights under the agreement or any rights against the defendant. All that could be inferred from these letters was that during this period the plaintiffs had been granting indulgence or extension of time to the defendant. There was absolutely no material before me on which the defendant could found his defence of estoppel by conduct on the part of the plaintiffs, their servants or agents.

On the second defence, I do not see how the action was in any way premature. The defendant had failed to pay the amount demanded and the plaintiffs were clearly at liberty to institute proceedings for recovery of the balance of the loan owing. The loan was secured and after the action had commenced they could proceed to sell the shares charged as security and give credit for the amount realized, which they did.

I now turn to the third defence. At the initial hearing of the appeal it was contended that after the default on the part of the defendant had arisen in 1985, the plaintiffs did not diligently proceed to exercise their rights and sell the shares charged to them. They held on to the shares for over one year and then sold the shares in 1986 and early 1987; the shares were sold between February 1986 and 27 January 1987. If they had sold the shares immediately or soon after the default of the defendant in 1985, they would have realized sufficient funds to pay off the loan or substantially the whole of the loan. However, no documentary evidence was produced to show the amount the plaintiffs could have realised if they had sold the shares in 1985. Subsequently, at the continued hearing of the appeal it was contended that the plaintiffs should have delayed the sale of the shares; they should have waited for the market to turn and sold the shares in May, June and July 1987. The defendant said that 'the plaintiffs knew or should know that any drop in the prices of these two shares, by virtue of the assets they represent, would be temporary in nature and they are bound to return to their normal values in due course.' What in effect the defendant suggested was that the plaintiffs should have exercised their rights as a mortgagee and sold the shares promptly in 1985 or delayed

their sales until May, June or July 1987 after the market had turned and improved. They failed to take either of the courses; they sold the shares at the worst of times, namely in 1986 and early 1987. The plaintiffs therefore, so it was submitted, had not acted prudently or exercised the standard of care required of them as a mortgagee.

Both on the facts and in law this defence had no merit whatsoever. Obviously in 1985, after the defendant had defaulted in payment of interest, the plaintiffs were giving indulgence or extension of time to the defendant. Obviously also, the plaintiffs did not expect the market to decline further. In 1986 the position of the defendant's loan account with the plaintiffs had worsened: he had continued to be in default in payment of interest and in repayment of a part of the loan as demanded, the loan had become inadequately secured and the market had declined further. In those circumstances, the plaintiffs were entitled to exercise their rights and sell the shares, which they did in 1986 and early 1987. Again, they did not expect the market to turn for the better later in 1987. All the shares sold by the plaintiffs were sold through stockbrokers at the quoted prices then prevailing and there was no question that the plaintiffs had acted throughout in good faith, certainly the defendant did not seek to impeach their good faith in respect of the sales. In my view, there was no material to sustain this complaint of the defendant.

The plaintiffs, as a mortgagee, after the power of sale had arisen, were entitled to sell the shares at such time as they think fit and in selling the shares they were under a duty to act in good faith and to obtain the true market value therefor at the date or dates when they were sold. They were under no obligation to wait for the market to turn and improve. In the leading case on this subject, *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd*,[1] at p 965, Salmond LJ (as he then was) said:

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes.

He then discussed the question whether a mortgagee in exercising the power of sale was also under a duty at the time of sale to take reasonable care to obtain the true market value of the property to be sold, and he said, at p 966:

> Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

And he concluded thus, at p 968:

> I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

Finally, there was also one wholly unmeritorious defence raised before the senior assistant registrar which should be mentioned. The defendant said that he signed the agreement and took the loan as agent for one Datuk YS Yap. Here again, no evidence at all was produced by the defendant and all the documentary evidence pointed to the contrary. He applied for the loan personally in his name and furnished to the plaintiffs all the particulars and information concerning himself: the assets owned by him and the directorships he held in various companies. The loan was released on written instructions signed by him personally and was released in payment of certain shares purchased by the stockbroker on his behalf, as was clearly evidenced by the letter from the stockbroker, Lyall & Evatt (Pte), dated 24 October 1985. Subsequently, there were various letters in exchange between him and the plaintiffs. In none of those letters written by him was there a slightest hint that the loan was taken by or the shares were those of Datuk YS Yap. I was truly amazed that in the face of all these irrefutable documents he had the audacity to depose solemnly in affidavits that he was acting as agent for Datuk YS Yap in respect of the agreement he signed, the loan he took and the shares he charged to the plaintiffs.

On the material before me, I came to the inescapable conclusion that the defences were put up solely for the purpose of delay, and I had no hesitation in rejecting all of them, which I did.

Appeal dismissed.

Solicitors: *Wong Yoong Tan & Molly Lim*; *Lim & Gopalan.*

Reported by *Terence Tan Bian Chye*